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No. 179

In the Supreme Court of the United States

OCTOBER TERM, 1959

GENERAL OUTDOOR ADVERTISING CO., INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Court of Claims (Pet. 1a–13a) is reported at 169 F. Supp. 947. A prior opinion of that court entered in this case is reported at 149 F. Supp. 163.

JURISDICTION

The judgment of the Court of Claims was entered on February 11, 1959 (Pet. 1a, 12a–13a), and a timely petition for rehearing was denied on April 29, 1959. The petition for a writ of certiorari was filed on July 6, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the two-year period of limitation within which a claim for refund may be filed under the provisions of Section 322(b) of the Internal Revenue Code of 1939 commences to run from the time a portion of the tax is paid, or only from the time the entire tax is paid.

2. Whether the Commissioner is required to send a taxpayer a notice of deficiency (90-day letter), pursuant to the provisions of Section 272(a)(1) of the 1939 Code, with respect to a portion of the tax voluntarily paid by the taxpayer.

STATUTE INVOLVED

Section 271(a), Section 272 (a) and (d), Section 321, Section 322 (a) and (b), and Section 3772(a) of the Internal Revenue Code of 1939 are set forth in Appendix, *infra*, pp. 12–14.

STATEMENT

The issue here involves the amount of tax which the taxpayer is entitled to recover under a previous decision by the Court of Claims in this case.[1] There, the controversy related to the amount of excess profits credit the taxpayer was entitled to for the years 1944 and 1945. Determination of that question depended upon the valuation of the two items included in the taxpayer's invested capital, namely, good will and land and buildings. The court sustained the Commissioner's determination of the value of the good

[1] Reported at 149 F. Supp. 163 (March 6, 1957), certiorari denied, 355 U.S. 891.

will, but held that he had erroneously reduced the value of the land and buildings placed on them by the taxpayer. In the latter respect, however, the court also held that the claim for refund based upon this erroneous valuation and filed on April 3, 1950, was not an amendment of the original claim, but rather an independent claim, and hence that, under the provisions of Section 322(b) of the Internal Revenue Code of 1939, the taxpayer could only recover payments of tax made within two years prior to the date the claim of April 3, 1950, was filed. Accordingly, the court held that the taxpayer was entitled to have its excess profits credit recomputed on this basis, and that the amount of the recovery was to be determined pursuant to Rule 38(c) of its rules. (Pet. 1a; 149 F. Supp. 163.) The taxpayer filed a petition for a writ of certiorari by which it sought review of the holding that the claim for refund filed on April 3, 1950, was an independent claim rather than an amendment of an original claim. This Court denied the petition, and the question of the amount of recovery giving rise to the present controversy came before the court below.

Specifically, the controversy relates to whether the taxpayer is entitled to recover a remittance of $225,000 and interest for 1944 taxes made by it in August, 1947, prior to a notice of deficiency or assessment. The facts giving rise to this controversy are as follows:

In May 1947, an Internal Revenue Agent made an examination of the taxpayer's tax returns for the years 1941–1944, inclusive. For the year 1944, the

only year involved here, the Agent's report proposed a deficiency of $419,193.64 in excess profits tax and an overpayment of income tax of $102,816.60. The net deficiency for 1944 was $316,377.04. (Pet. 2a, 7a.)

A copy of this report was furnished to the taxpayer with a letter dated July 23, 1947, which enclosed a form for "waiver and acceptance" and one for acknowledgment of receipt of the report with an expression of the taxpayer's position with respect to it. The letter stated that it was "not a final notice of deficiency". The taxpayer did not execute the form for waiver and acceptance, but did execute the form headed "Receipt of Revenue Agent's Report" indicating that it did not agree with the Agent's report in full, that it intended to file a protest to part of the report, and that it was enclosing a check in part payment of the deficiency in tax indicated in the report. (Pet. 2a–3a, 7a–8a.)

The document was enclosed in a letter of the same date (August 14, 1947), which read in part (Pet. 3a–4a, 8a):

> * * * Part of the net tax will be made the subject of a Protest to be filed with the agent in charge.
>
> It is our purpose hereby to stop the further running of interest on the net tax deficiency for 1944 by making a payment on account of so many dollars in principal of tax and so many dollars of interest on such tax. Therefore, find enclosed herewith a check payable to your order in the sum of $225,000.00 to apply on the tax principal and another check payable to your

order for $33,750.00 to apply on interest accrued on the tax deficiency for this year.

Enclosed also were two checks, one for $225,000 on account of the 1944 tax deficiency, and the other for $33,750 as accrued interest. (Pet. 4a.)

Upon receipt of these checks, the Collector credited them to the unclassified collection account, since at that time there was no unpaid assessment for 1944 against the taxpayer to which the payment could be credited. About two months later, on October 10, 1947, without the taxpayer's knowledge, an assessment for the year 1944 of $225,000 as excess profits tax and $32,625 as interest, computed to August 15, 1947, was made. About a month after the assessment, on November 14, 1947, the sums were transferred by the Collector from the unclassified account and credited against the assessment of October 10, 1947. (Pet. 4a, 9a–10a.)

A refund of $1,125,[2] as an overpayment of this assessment, was the first actual notice the taxpayer had of this assessment. This was in April, 1948. (Pet. 4a, 10a.)

Meanwhile, the taxpayer had protested the remainder of the adjustments covered by the original report and final determination by the Commissioner of the total deficiency was not made until April, 1948. (Pet. 9a, 10a-11a.) The total deficiency was fixed at $308,493.20, and, when the prior payment of $225,000 was deducted, a deficiency of $83,493.20, plus interest of

[2] This sum represented the difference between the amount ($33,750) remitted by taxpayer as interest and the sum of $32,625 assessed as interest. (Pet. 10a.)

$16,028.41, was placed on the assessment list on October 10, 1947. This balance was paid in August and September, 1948. (Pet. 11a.) The claim for a refund was filed on April 3, 1950.

The court held that the October 10, 1947, assessment and the subsequent application to this assessment of the remittance of $225,000 were valid, and that the refund claim as to that amount is barred by the two-year statute of limitations. (Pet. 6a.)

The taxpayer's motion for rehearing, protesting the action of the court in failing to allow recovery of the payment of $225,000, plus interest, was denied on April 29, 1959.

ARGUMENT

The taxpayer's contentions (1) that the decision of the court below "stands in direct opposition" to the principles announced by this Court in *Flora* v. *United States*, 357 U.S. 63, rehearing granted, June 22, 1959, and (2) that it is in conflict with the decision of the Ninth Circuit in *United States* v. *Price*, 263 F. 2d 382, certiorari granted, 359 U.S. 988, are totally without merit.

1. The holding of this Court in the *Flora* case is simply that a taxpayer must pay the full amount of an assessed tax due including the full amount of an income tax deficiency before he may challenge its correctness by a suit for refund under 28 U.S.C. 1846 (a)(1). Here, as the taxpayer admits (Pet. 4–5) and as shown by the findings of the court (Pet. 11a), the entire amount of the tax had been paid either by cash or credits, prior to the time taxpayer invoked the jurisdiction of the Court of Claims under 28 U.S.C.

1491. In view of this fact, there is no conflict with the *Flora* decision.

The taxpayer, however, seeks to extend the principle of "full" payment of tax to the commencement of the two-year limitation period for claiming a refund (Section 322(b) of the Internal Revenue Code of 1939, Appendix, *infra*, p. 14). There is no justification for this either in logic, the language of Section 322(b), or in this Court's opinion in the *Flora* case.

In the first place, the provisions of Section 322(b)(1) and (2) are directed to the refund of overpayment of the "tax" and or of an "installment of the tax"; this is apparent from the provisions of Sections 321 and 322(a) of the 1939 Code. (Appendix, *infra*, pp. 13–14.) As to such payments, Section 322(b)(1) imposes a time limit upon the allowance of a refund, and provides, in material part, that unless a claim for refund is filed by a taxpayer within three years from the time the return is filed or within two years from the time the tax is paid, no refund shall be allowed or made after the expiration of whichever of such periods expires the later. Section 322(b)(2) imposes a limit on the amount of the refund, and is directly applicable to the facts of this case. It provides, as limited by paragraph (B) thereof, that if a claim for refund is filed, though not within three years from the time the return was filed by the taxpayer, the amount of refund shall not exceed the "portion of the tax" paid during the two years immediately preceding the filing of the claim. When the provisions of Section 322(b)(1) are read in the light of subsection

(2)(B), and the provisions of Section 321, it is obvious that the word "tax" means any "portion" or "installment" of the tax paid, and not the full amount of the tax.

Where, as here, the taxpayer acquiesced in the proposed deficiency to the extent of $225,000, the remittance of that amount by the taxpayer prior to assessment with the intent that it be used to discharge his liability, afforded, as the Court of Claims found, justification for the Commissioner in making the assessment of the $225,000 and in satisfying it with taxpayer's remittance of that amount. (Pet. 5a–6a). *Hill* v. *United States*, 263 F. 2d 885 (C.A. 3). See also *Roseman* v. *United States*, 323 U.S. 658; *Lehigh Portland Cement Co.* v. *United States*, 30 F. Supp. 217 (C. Cls.); *Lewyt Corp.* v. *Commissioner*, 215 F. 2d 518, 522–523 (C.A. 2), modified on other grounds, 349 U.S. 237. To hold, as taxpayer argues (Pet. 8), that such installment or partial payment cannot be made the subject of an "effective" refund claim and is not a "recoverable" tax, would nullify the plain language of Section 322(b) (1) and (2). It does not follow that since payment of the entire tax is a condition precedent under which the United States has consented to be sued in a refund suit, the same requirement exists with respect to the filing of a claim for refund either as a condition to recovery of an alleged overpayment of tax through administrative action under the provisions of Section 322, or by suit. When recovery is sought by suit, Section 3772(a)(1) of the 1939 Code (Appendix, *infra*, p. 14) imposes two dis-

tinct conditions upon a taxpayer, namely, that, as held in *Flora*, the tax has been paid in full prior to suit, and that a proper and timely refund claim has been filed.[3] In this latter respect, the *Flora* decision has no application.

2. The question presented in *United States* v. *Price*, *supra*, is whether the issuance of a 90-day notice of deficiency (provided for in Section 272(a)(1) of the 1939 Code, Appendix, *infra*, pp. 12–13) is essential to the validity of an assessment of federal income taxes where, prior to assessment, a taxpayer has filed (as provided in Section 272(d) of that Code, Appendix, *infra*, p. 13) a waiver of restriction on assessment and collection. The Ninth Circuit held (263 F. 2d 382) that it was. As previously indicated, the United States is contesting that holding before this Court. However, assuming, *arguendo*, that the decision of the Ninth Circuit is correct, it nevertheless has no application to the assessment of that portion of the tax ($225,000) voluntarily paid by the taxpayer prior to its assessment.[4]

Section 271(a)(1) (Appendix, *infra*, p. 12) which defines the term "deficiency", indicates that a valid tax may be "collected without assessment". Furthermore, our system of federal taxation is basically one of annual self-assessment,[5] and where, as here, the

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[3] *United States* v. *Felt & Tarrant Co.*, 283 U.S. 269, 272–273; *Rosenman* v. *United States*, 323 U.S. 658, 661.

[4] It is also to be noted that in the *Price* case the United States instituted suit in which it sought to collect the balance of the unpaid assessment.

[5] *Manning* v. *Seeley Tube & Box Co.*, 338 U.S. 561, 565; *Spies* v. *United States*, 317 U.S. 492; *Helvering* v. *Mitchell*, 303 U.S. 391.

taxpayer admitted an additional liability as indicated by the report of Internal Revenue Agent (Pet. 3a–4a, 8a), and made a payment of $225,000 to be applied against that liability, the tax was to that extent self-assessed, irrespective of any formal act of assessment by the Commissioner. *Hill* v. *United States* 263 F. 2d 885 (C.A. 3). As to that amount, as the court below said (Pet. 6a), the taxpayer waived the notice required by Section 272(a)(1). Cf. *Lehigh Portland Cement Co.* v. *United States*, 30 F. Supp. 217 (Ct. Cls.).

Again, once the sum of $225,000 had been applied in part payment of the tax ultimately determined by the Commissioner to be due, there was, to that extent, no "deficiency" to be determined by the Commissioner. Since Section 272(a) authorizes the Commissioner to mail a notice of "deficiency" to a taxpayer only in case he determines that a deficiency exists, there was no reason for mailing such a notice with respect to the amount ($225,000) of tax already paid.

Section 272(a) was enacted to assure taxpayers the right to litigate a proposed deficiency assessment in the Tax Court prior to its payment,[6] and the only purpose of the notice of deficiency (90-day letter) is to apprise a taxpayer of the nature and amount of the deficiency in tax determined by the Commissioner in order to afford him the opportunity to contest it prior to its assessment and collection.[7] The purpose

[6] See *Old Colony Tr. Co.* v. *Commissioner*, 279 U.S. 716.

[7] *Commissioner* v. *Forest Glen C. Co.*, 98 F. 2d 968, 971 (C.A. 7); *Commissioner* v. *Stewart*, 186 F. 2d 239, 241 (C.A. 6); *Standard Oil Co.* v. *McMahon*, 244 F. 2d 11 (C.A. 2); *United States* v. *Curd*, 257 F. 2d 347, 350 (C.A. 5), certiorari denied, 358 U.S. 920.

of Section 272(d) is to stop the accrual of interest if a taxpayer waives the restrictions of Section 272(a), thus permitting the immediate assessment and collection of a deficiency.[8] The basic and essential restriction imposed by Section 272(a) is that the Commissioner cannot assess and collect until expiration of the period provided following the mailing of a deficiency notice. To the extent that a tax liability is admitted and paid, as here, such restriction is meaningless. The *Price* case did not involve any such problem and hence the holding of the Ninth Circuit therein is not in conflict with the decision below.

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted.

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[8] See *Moore* v. *Cleveland Ry. Co.*, 108 F. 2d 656, 659 (C.A. 6); *Payson* v. *Commissioner*, 166 F. 2d 1008, 1009–1010 (C.A. 2); and *Roos* v. *United States*, 31 F. Supp. 144 (C. Cls.).

APPENDIX

SEC. 271 [as amended by Sec. 14(a), Individual Income Tax Act of 1944, c. 210, 58 Stat. 231]. DEFINITION OF DEFICIENCY.

(a) *In General.*—As used in this chapter in respect of a tax imposed by this chapter, "deficiency" means the amount by which the tax imposed by this chapter exceeds the excess of—

(1) the sum of (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in subsection (b)(2), made.

* * * * *

(26 U.S.C. 271.)

SEC. 272 [as amended by Sec. 203(a), Act of December 29, 1945, c. 652, 59 Stat. 669]. PROCEDURE IN GENERAL.

(a)(1) *Petition to The Tax Court of the United States.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day) the taxpayer may file a petition with the Tax Court of the United States for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a

petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 3653 (a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. * * *

* * * * * *

(d) *Waiver of Restrictions.*—The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of the deficiency.

* * * * * *

(26 U.S.C. 272.)

SEC. 321. OVERPAYMENT OF INSTALLMENT.

If the taxpayer has paid as an installment of the tax more than the amount determined to be the correct amount of such installment, the overpayment shall be credited against the unpaid installments, if any. If the amount already paid, whether or not on the basis of installments, exceeds the amount determined to be the correct amount of the tax, the overpayment shall be credited or refunded as provided in section 322.

(26 U.S.C. 321.)

SEC. 322 [as amended by Sections 169(a) and 172(c)(1) of the Revenue Act of 1942, c. 619, 56 Stat. 798]. REFUNDS AND CREDITS.

(a) *Authorization.*—

(1) *Overpayment.*—Where there has been an overpayment of any tax imposed by this chapter, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

* * * * * *

(b) *Limitation on Allowance.*—

(1) *Period of limitation.*—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

(2) *Limit on amount of credit or refund.*—The amount of the credit or refund shall not exceed the portion of the tax paid—

* * * * *

(B) If a claim was filed, and (i) no return was filed, or (ii) if the claim was not filed within three years from the time the return was filed by the taxpayer, during the two years immediately preceding the filing of the claim.

* * * * *

(26 U.S.C. 322.)

SEC. 3772. SUITS FOR REFUND.

(a) *Limitations.*—

(1) *Claim.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

* * * * *

(26 U.S.C. 3772.)

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